Supreme Court of the United States

OCTOBER TERM, 1956

No. .....

EDDIE CAMPBELL, JR., PETITIONER,

versus

STATE OF SOUTH CAROLINA, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of South Carolina, in opposition to the Petition for the writ of certiorari asked for by the Petitioner in this matter, begs to submit the following points and authorities:

STATEMENT

We accept the Statement of the Petition as being substantially correct except that it does not show that the Petitioner was given a true copy of the statement he made at Camp Lejeune on the day he made it, February 25, 1955, for which he gave a signed receipt (Transcript B 31); that he kept this without complaining to those to whom he gave it or to any South Carolina official until the day of the Fleming trial on November 14, 1955, when the Solicitor for

the first time was notified by counsel for Fleming, father-in-law of Petitioner, that Petitioner was going to repudiate his former statements (Transcript B 28-30). We call attention of the Court to the fact that Petitioner can read as shown by the fact that he read his statement from the witness stand (Transcript B 31), is a Sergeant in the Marine Corps, and the whole record shows that he is not a poor, weak, ignorant person, as Petitioner's statement would indicate. We, of course, deny the allegation of the Statement that the *Fleming case* was held solely to lay a basis to trap Petitioner into perjury. Its purpose was to convict Fleming for burning his car. If Petitioner perjured himself, that was incidental.

The Petitioner was not denied any Federal or State Constitutional Rights to Counsel at the Preliminary Investigations.

Petitioner's main contention is that he was denied right to counsel during the preliminary investigations. He had counsel at his trial. The Sixth Amendment of the United States Constitution gives the accused in all criminal prosecutions the right to assistance of counsel for his defense. Article 1, Section 18, of the South Carolina Constitution provides that in all criminal prosecutions the accused shall enjoy the right to be heard fully in his defense by himself or counsel or both. These constitutional provisions have been widely stretched beyond the literal meaning of the words to give the accused the benefit of counsel at all stages of the prosecution and the preliminaries leading thereto. But no case that we can find goes so far as to hold that that one who is not accused, who does not demand counsel, and who is merely asked questions about a possible crime, is entitled either to have present his own counsel or have one appointed for him. We think this claim of the

Petitioner is conclusively answered against him by the recent case of *Re Groban*, 352 U. S. . . . ., 1 L. Ed. 376, where the following occurs:

> "A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies. There is no more reason to allow the presence of the counsel before a Fire Marshall trying in the public interest to determine the case of a fire. Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then, his protection is the privilege against self-incrimination. U. S. Const., Amend V; Ohio Const. Art. 1, Sec. 10. See *Adamson v. California*, 332 U. S. 46, 52, 91 L. Ed. 1903, 1909, 67 S. Ct. 1672, 171 A. L. R. 1223. This is a privilege available in investigations as well as in Prosecutions." (Citing cases.)

In the *Groban case*, Groban demanded counsel, which was refused, the hearing was held in private and he was committed to jail for refusal to answer questions. In the case of the Petitioner here, he made no demand for counsel, the February investigation at Camp Lejeune was held with a member of the Criminal Investigation Division of the Marine Corps present (*Fleming case* Transcript, page 14), and Petitioner was immediately given a copy of his statement, all of which makes our case much stronger than the *Groban case*. Petitioner was no dumb clod of human earth. He was a sergeant in the Marine Corps, with four years' experience. He claimed not to be able to read, which is inconceivable in view of his position with the Marines, and which was refuted by his reading his own testimony during the Fleming trial (*Fleming case* Transcript, pages 19-20). He was not an accused nor was the investigation part of any criminal proceeding against him. In view of the above,

he had no right to counsel and cannot seek a reversal on that ground.

The Petitioner was not forced to testify against himself in violation of either State or Federal Constitutions.

In none of his written or oral statements made prior to the trial of the case of *State v. Fleming*, did the Petitioner testify to anything that would incriminate him in the burning of the car. He made no confessions under duress or otherwise. His only claim that he gave the statements under duress is that he feared some loss of military rank or punishment if he did not give such statements. This was denied by those present when the statements were given (Transcript A 23, 33-36, 69-71).

His real claim is that he was forced to take the witness stand in the trial of *State v. Fleming*. We think he did this not only under the compulsion of the State, but with the ulterior motive of helping out his father-in-law by repudiating the statements given. His actions lead to this conclusion. He was called to the witness stand, sworn as a witness, and did repudiate all material parts of his statements.

This put the Solicitor in the same position the United States Attorney found himself in in *United States v. Block*, 80 Fed. (2d), 618, where the Court held that a witness who repudiated a statement in order to help out his defendant brother, could be cross examined by the District Attorney who called him.

It has been held for many years that there is a duty on the part of all citizens to testify about criminal activities when called upon. The following is from *United States v. Bryan*, 339 U. S. 323, 94 L. Ed. 884, 70 S. Ct. 724.

> "On the other hand, persons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions

to the public interest in the orderly operation of legislative and judicial machinery. A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity. We have often iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned. See *e.g., Blair v. United States,* 250 U. S. 273, 281, 63 L. Ed. 979, 983, 39 S. Ct. 468 (1919); *Blackmer v. United States,* 284 U. S. 421, 438, 76 L. Ed. 375, 383, 52 S. Ct. 252 (1932)."

We have found no case holding that the provisions of the Fifth Amendment to the Constitution of the United States against self-incrimination applies to the protection of a witness to such an extent as to allow him to refuse to take the witness stand when properly called upon, or to exempt him from liability for perjury committed while on the stand. The following is from *Glickstein v. United States,* 222 U. S. 139, 56 L. Ed. 128:

> "Of course, these propositions being true, it is also true that the immunity afforded by the constitutional quaranty relates to the past, and does not endow the person testifying with a license to commit perjury."

Article 1, Section 17, of the South Carolina Constitution contains the same provision against self-incrimination as does the Federal Constitution. We also have a statutory provision very similar to those involved in the *Glickstein case,* this being Section 26-405 of the 1952 Code of Laws of South Carolina, as follows:

> "In the trial of all criminal cases, the defendant shall be allowed to testify if he desires to do so, and not otherwise, as to the facts and circumstances of the case. Testimony given under this section shall not afterwards be used against the defendant in any other

criminal case, except upon an indictment for perjury founded upon that testimony."

We cite this merely to show that both the Federal and State laws recognize the liability of even a defendant being prosecuted for perjury committed by him while acting as a witness.

The facts show proper grounds for conviction of the Petitioner or perjury.

Petitioner was indicted under Section 16-203 of the South Carolina Code, which is as follows:

"Whoever shall, willfully and knowingly, swear falsely in taking any oath required by law, administered by any person directed or permitted by law to administer such oath, shall be guilty of perjury and, on conviction, incur the pains and penalties of that offense."

The common law offense of perjury was changed by this Statute. The old rule as to materiality now no longer applies. *State v. Byrd,* 28 S. C. 18, 4 S. E. 793. Even if it did, the physical facts disclosed by the burned car and its peculiar characteristics, and the evidence of the other witnesses refute Petitioner's testimony, on material facts as to whether or not the car was willfully burned, as admitted in the Petition, Page 8.

The situation here is similar to that in *State v. Crowley,* 226 S. C. 472, 85 S. E. (2d) 714, from which the following is taken:

"Prior to the murder trial at which the perjured testimony was given, appellant was taken into custody by the officers for the purpose of investigation of the murder and made a written, sworn statement of facts which were considered material to the prosecution. Appended to the statement was appellant's signed receipt of a copy of it. Despite several pre-trial conferences with counsel for the prosecution appellant did not

question the facts recited in his former sworn statement until he was placed on the witness stand in the murder trial when he repudiated the statement and claimed that it was obtained from him by duress, the particulars of which duress he purported to give in his testimony which was perjured, according to the great weight of the evidence. The perjuries were established by the testimony of the investigating officers and others, by appellant's sworn statement (and signed receipt of copy of it) and by corroborating circumstances. As said above, the proof of appellant's guilt fully met the requisite quantum in such cases. * * *."

The mere fact that Fleming won a civil case against the insurance company, as claimed in the Petition, does not preclude the bringing of the perjury charges against Petitioner. A former acquittal of even a defendant in a criminal case for some other charge, would not be *res judicata* on the issue of his guilt of perjury committed while testifying at the first trial. *Kuskulis v. United States,* 37 Fed. (2d) 241; *Allen v. United States,* 194 Fed. 664.

The introduction in evidence at Petitioner's perjury trial did not deprive him of any constitutional rights.

When evidence is given by anyone without invoking the privilege against self-incrimination, he cannot afterwards at another trial or proceeding, claim the privilege. *Warde v. United States,* 158 Fed. (2d) 651; *Heller v. United States,* 57 Fed. (2d) 627, Cert. den. 286 U. S. 567. No claim is made by Petitioner that he invoked the Fifth Amendment in any of the preliminary investigations involving the statements. He could not have done so to protect his father-in-law, as his privilege is personal, *Rogers v. United States,* 340 U. S. 367, 95 L. Ed. 344. Having made the statements, without complaint, he could not later complain when they were used against him when he tried to help out Fleming.

CONCLUSION

For the above reasons we do not see any novel, important, or undecided question of law involved here, that meet the requirements of Rule 19 of the Court, governing the issuance of Writs of Certiorari. It is settled (1) that an unaccused person may be questioned in preliminary investigations about crimes, without right to counsel and (2) that witnesses duly summoned must take the stand and testify as a duty of all citizens unless they incriminate themselves about past actions. Such witness has the right to claim the Fifth Amendment, but this gives him no license to commit perjury.

Petitioner has had a full and fair trial by jury of his peers, according to law. He is entitled to no more. If this Court holds that all those interviewed by officers of the law are entitled to counsel, before any accusation are made, or if it holds that the Fifth Amendment allows witnesses to refuse to even take the witness stand for fear of perjuring themselves, it will have turned back the hands of the clock and will have emasculated law enforcement, making of the Fifth Amendment even more of a shelter for wrongdoers than it is now being distorted into by so many.

We respectfully ask the Court to deny the writ.

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